Filed 4/30/19 In re K.H. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.H., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. D.H., Defendant and Appellant.	E071666 (Super.Ct.No. RIJ1600604) OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni, Judge. Reversed with directions.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Father appeals orders which led to the termination of his parental rights over his daughter, K.H., who was a few months old when the Riverside County Department of Public Social Services (department) removed her due to neglect. Father says the trial court erred in ruling the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) does not apply to K.H. because the department did not properly investigate her background and the relevant tribes received defective notices. We agree and therefore conditionally reverse.

I

FACTS

This dependency appeal involves appellant D.H. (father), B.R. (mother),[1] and their child, K.H., who was born in 2016. In the summer of 2016, father, mother, and child were homeless and living in motels around Corona. Father and mother had recently married, but their relationship was characterized by drug use and domestic violence. Their attempts to participate in assistance programs were limited by mother's aggressive behaviors, symptoms of her mental health disorders.

K.H. came to the attention of the department after mother's arrest for assaulting father in July 2016. The department received a referral saying the child might be at risk due to domestic violence, drug use, and homelessness.

[1] Mother is not a party to the appeal.

On July 19 and 21, 2016, the department filed petitions in the juvenile court alleging K.H. came within the provisions of section 300, subdivision (b). The court found the department had established a prima facie case and she should be temporarily removed from parental custody. The department's final amended petition alleged the parents had a history of domestic violence, drug abuse, criminal convictions for violence, and were living a transient and unstable lifestyle.

Meanwhile, there was considerable confusion about the identity of K.H.'s biological father. While the initial investigation was under way, father called the social worker and told her he was at the hospital with K.H. and mother was present and trying to take the child. When law enforcement arrived, they were told mother was yelling that D.H. was not the child's biological father and had no right to her. The same day, both mother and father reported father *was* K.H.'s biological father. On August 9, 2016, mother again claimed father was not K.H.'s biological father and identified R.H. as the biological father. A few days later, father conceded the possibility, but said he wanted to remain in K.H.'s life anyway.

In the surrounding confusion, father's attorney appeared to concede in court that D.H. was not the biological father. At a hearing on September 12, 2016, the department represented that an alleged biological father, R.H., had asserted fatherhood and taken a DNA test. The department requested a continuance because the test results weren't in. Father did not oppose the continuance, but opposed having a DNA test performed on himself. "[A]lthough we did have a discussion at calendar call regarding DNA for my

client as well, my client is married to the mother, and he is holding himself out as the presumed father. He understands that father [R.H.] has the right to attempt to elevate himself as well . . . I don't know that my client necessarily wants to take a DNA test. He will if the Court orders him to do it." The court asked, "Well, could he be the biological father?" Mother interjected, "No." Father's counsel replied, "Father says no as to biological but, again, he is married to mother." Father's counsel said the DNA test "would be a waste of time, and that is why I continued to object to that."

On October 26, 2016, the court held a jurisdiction and disposition hearing. There, the court learned the DNA test results showed R.H. was *not* K.H.'s biological father and struck him from the petition. The court also learned mother had relocated to Baltimore, her hometown. The court found the allegations made under section 300, subdivision (b) were true, declared K.H. a dependent, and placed her in foster care. The court ordered the department to provide the family with reunification services. The court also found father to be K.H.'s presumed father. D.H. later renewed his claim to be K.H.'s biological father, but the trial court never resolved the issue.

Over the next two years, reunification services proved insufficient to address the root causes of the dependency. At the 18-month review hearing, the court terminated services.[2] In a section 366.26 report, the department concluded K.H. was an adoptable child. She had lived with the same prospective adoptive family for two years and had a

[2] The court advised father of his right to challenge the order terminating services by way of a petition for extraordinary writ in the Court of Appeal. Father pursued a writ, which we denied by opinion filed on May 23, 2018, in case number E070168.

strong bond with them. On November 15, 2018, the court found K.H. was adoptable and none of the section 366.26, subdivision (c)(1)(B)(i) exceptions applies. The court terminated father's and mother's parental rights.

Father filed a timely notice of appeal. His appeal does not raise any ground for reversal except that the department failed to comply with ICWA's notice requirements. We recount the facts relevant to that issue in the next section.

A. *ICWA Notice*

On July 19, 2016, K.H.'s parents told the department she may have Native American ancestry on both sides of her family. Father said he may have Native American ancestry, but said he didn't know any details. He said his mother would know more and told them he would contact her to find out. He denied being registered with a tribe. Mother also said she might have Native American ancestry, but did not know which tribe. She said she thought the tribe's name began with the letter "C."

On July 22, 2016, the court found ICWA may apply, ordered both parents to complete an ICWA-020 form to identify tribes they might be associated with, and ordered the department to provide ICWA notice.

Both parents filed their forms the same day. Mother indicated she may have Native American ancestry "through my mother Darlene [R.] DOB 4/29/1957." She also identified her great-grandmother, "Mary Lou [V.] DOB unknown," as a possible source. Father said he was a member or may be eligible for membership in a Cherokee tribe and K.H.'s paternal grandmother, Karen W., is or was a member of a tribe.

On July 27, 2016, the department sent out a notice of K.H.'s jurisdiction and disposition hearing that noted she may be an Indian child under the statute (ICWA notice). The department addressed the ICWA notice to K.H.'s parents, the Area Director of the Sacramento Office of the Bureau of Indian Affairs, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, and the Mississippi Band of Choctaw Indians.

The notices provided information to identify K.H.'s ancestors. It included father's full name, current and former address, birth place, and birth date. It gave the same information for mother, except it added an alternative spelling of her name and withheld her current address as confidential. The notice identified mother's biological parents as Darlene R. and Tyrone G. It gave grandmother's current address, two alternative birth dates, her place of birth, and said she may have Cherokee ancestry. It gave maternal grandfather's birth place and said he may have Cherokee ancestry.

The notice identified father's biological parents as Karon H. and John H. It provided alternative names for his mother, including Karen W. It said the paternal grandmother died on October 26, 2003 in Buffalo, New York, gave her birth place and birth date, and said she may have Cherokee or Choctaw ancestry. It gave paternal grandfather's current address, and birth date, but no other information, and did not claim he had Native American ancestry.

The notice also gave information about seven of K.H.'s great-grandparents. It gave names for three of her maternal great-grandparents (Mary Lou V., Gloria R., and Archie R.), dates and locations of birth for two of them, a date and location of death for another, and said of each that they might have Cherokee ancestry. Regarding K.H.'s paternal great-grandparents, the notice gave names for each (Mimi H., Rena Mae H. (aka Rena Mae B.), J.W.H., and Charles W.) and said each may have Cherokee or Choctaw ancestry. The notice gave some information about the places of birth, and dates and places of death for three of the four.

In August 2016, four of the six tribes responded K.H. was not a member or eligible to become a member of their tribes. The United Keetoowah Band of Cherokee Indians determined there was no evidence K.H. was a descendent from anyone on their roll. The Choctaw Nation of Oklahoma said they had researched their records and were unable to establish Indian heritage. The Eastern Band of Cherokee Indians said they had reviewed their registry and determined K.H. is neither registered nor eligible to register as a member of their tribe. The Mississippi Band of Choctaw Indians said neither the child nor the relatives identified in the ICWA notice were enrolled or eligible for enrollment in their tribe.

On August 17, 2016, the department filed the ICWA notices and the tribes' responses with the court. On August 22, 2016, the trial court found the department "provided notice to all identified tribes and/or Bureau of Indian Affairs ('BIA'), as required by law."

However, by April the next year, the department had concluded they should obtain more information and reissue notices. On April 10, 2017, the department's ICWA noticing clerk informed the supervising social worker additional dates of birth for both father's and mother's relatives were needed to verify Native American heritage. The social worker wrote she had forwarded the request to both parents and they were "gathering the information." At a hearing on April 26, 2017, the department informed the court they may have reason to redo the notice, and the court found ICWA may apply.

We have no record of the department receiving additional information, issuing new ICWA notices, or receiving new responses from the tribes. All we have are fragmentary summaries of what happened next. According to the January 9, 2018 18-month permanency review report, "In April 2017, several tribal responses were received from the Choctaw Tribe indicating that the child is not a member of the tribe." The social worker reiterated they needed additional information regarding the birthdates of the parents' relatives. The report did not indicate that any new information had been provided, but recommended the court find ICWA did not apply. On January 31, 2018, the department filed copies of notices they sent to the Jena Band Choctaw and the Cherokee Nation, but these are not ICWA notices and contain no information concerning K.H.'s heritage whatsoever.

On March 15, 2018, the court held a contested 18-month review hearing. The court found ICWA did not apply without explanation, and the minute entry says the court

found sufficient inquiry had been made and there was no new information to indicate ICWA may apply.

According to a selection and implementation hearing report filed June 28, 2018, "in May 2018, the father . . . was again questioned about his Native American Ancestry with the Cherokee Tribe. Further information was needed regarding the paternal great grandfather, Charles W., specifically his middle name and date of birth. [Father] . . . reported that the paternal great grandfather was deceased and the information was not available. This Social Worker contacted the ICWA noticing clerk, Donna Theroux, by telephone on May 14, 2018, and informed her of father's response."

As we noted above, the court later terminated father's and mother's parental rights, and father filed a timely notice of appeal.

II

ANALYSIS

ICWA requires notice to Native American tribes "in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court [or social worker] knows or has reason to know that an Indian child is involved.'" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8; see also Welf. & Inst. Code, § 224.3, subd. (d), unlabeled statutory citations refer to this code.) Any tribe to which the child belongs, or in which they may be eligible for membership, must receive "notice of the pending proceedings and its right to intervene." (*In re H.B.* (2008) 161 Cal.App.4th 115, 120; see also § 224.2, subd. (a)(3).)

The court and county welfare department have an "affirmative and continuing duty to inquire" whether a child in dependency proceedings "is or may be an Indian child." (§ 224.3, subd. (a).) If the court or social worker has reason to know an Indian child may be involved, the social worker must, as soon as practicable, interview the parents and extended family members to gather the information that should be included in the ICWA notice. (*Id.* at subd. (c).)

ICWA notices shall include, among other things, the identifying information for the child's biological parents, grandparents, and great-grandparents, to the extent known. (§ 224.2, subd. (a)(5)(C).) The notices should contain "all available information about the child's ancestors, especially the ones with the alleged Indian heritage." (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

The county welfare department must send notice of all hearings until the court determines ICWA does not apply. (§ 224.2, subd. (b).) For the court to determine whether the county has satisfied the notice requirements of ICWA, "it must have sufficient facts, as established by the [district], about the claims of the parents, the extent of the inquiry, the results of the inquiry, the notice provided any tribes and the responses of the tribes to the notices given. Without these facts, the juvenile court is unable to find, explicitly or implicitly, whether . . . ICWA applies." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.)

The court may find ICWA does not apply if 60 days have passed since the tribes received adequate notice and no tribe responds to the notice. (§ 224.3, subd. (e)(3).)

Even if the court has determined ICWA does not apply, if the court or social worker receives new information that was required to be in the ICWA notice, the social worker *must* provide the new information to the applicable tribes. (§ 224.3, subd. (f).) Failure to comply with the ICWA notice provisions and determine whether ICWA applies constitutes prejudicial error requiring a limited remand. (*In re L.S.*, *supra*, 230 Cal.App.4th at p. 1197; *In re B.H.* (2015) 241 Cal.App.4th 603, 608-609.)

In this case, we are called on to determine whether the trial court's second determination that ICWA does not apply was defective. Initially, the department sent out an ICWA notice to six Cherokee and Choctaw tribes and the BIA. The notices provided the required information for mother and father. They also provided some information about the grandparents and great-grandparents. The notices indicated all K.H.'s grandparents, except her paternal grandfather, and all her great-grandparents, may have Native American ancestry. Four of the six tribes responded saying K.H. was not a member or eligible to become a member of their tribes. The department filed the ICWA notices and the responses with the court, and the court found the department had provided notice to all the identified tribes and/or the BIA, as required by law.

That didn't end the matter, however, because the department's ICWA noticing clerk later informed the social worker they needed to obtain more information for relatives of both father and mother. The department informed the court they had reason to send new notices, and the court again found ICWA may apply. All of that was appropriate. (§ 224.3, subd. (f).)

It's what happened next that we must review, and it appears the process broke down. The department did not update the court regarding its attempts, if any, to obtain the additional information. All we know is the social worker asked the parents to gather information. We don't know how or whether they responded, nor do we know whether the department attempted to contact any other relatives to obtain the needed information. Nor do we have any indication that the department updated the tribes or the BIA. All we have are two simple notices sent to the Jena Band of Choctaw and the Cherokee Nation about the 18-month review hearing. But those notices don't contain any of the standard ICWA information, much less information about K.H.'s heritage to supplement what the department provided initially. (See *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739, fn. 4 ["DSS should provide to the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status"].) We conclude that without more facts concerning the department's investigation, the family's responses, and any subsequent notices and tribal responses, the trial court could not find—implicitly or explicitly—that ICWA did not apply. (*In re L.S.*, *supra,* 230 Cal.App.4th at p. 1198 ["While the Agency may have performed its duty of inquiry, it failed in its duty to document it and to provide clear information to the court so the court could rule on the question of whether the ICWA applied"].)

"[T]he juvenile court also failed in its duty. Given the conflicting and inadequate information on [parents'] claim of Indian heritage, the court had a duty either to require the [department] to provide a report with complete and accurate information regarding

the results of its inquiry and notice or to have the individual responsible for notice to testify in court regarding the inquiry made, the results of the inquiry, and the results of the notices sent. Only then could the court determine whether the ICWA applied." (*In re L.S.*, *supra*, 230 Cal.App.4th at p. 1198.) These failings require a conditional reversal.

The department advances a litany of reasons the error was harmless. First, they claim there was no harm because father didn't claim paternal grandfather had Native American heritage or possessed additional information about K.H.'s Native American heritage. Second, they make a similar argument about maternal great-grandfather. Third, they claim mother didn't claim Native American heritage for maternal grandfather, making the fact that the notices didn't include his date of birth irrelevant. However, in each of these cases, the ICWA notices say the relatives may have Native American heritage. Fourth, they claim there was no harm because they tried to reach maternal grandmother about relative placement in 2018 and she never responded. We refuse to conclude maternal grandmother would not respond to an inquiry seeking information about her family's heritage based on her refusal to respond to inquiries about placing a young child in her household.

Fifth, the department claims the error was harmless because "father fails to show that [certain missing information] was actually available but missing from the ICWA notice." The department "is correct that, in general, an appellant has the burden of producing an adequate record that demonstrates reversible error. [Citation.] However, ICWA compliance presents a unique situation, in that . . . although the parent has no

burden to object to deficiencies in ICWA compliance in the juvenile court, the parent may nevertheless raise the issue on appeal. [Citation.] The purpose of ICWA and the California statutes is to provide notice to the tribe sufficient to allow it to determine whether the child is an Indian child and whether it wishes to intervene in the proceedings. [Citation.] The parent is in effect acting as a surrogate for the tribe in raising compliance issues on appeal. Appellate review of procedures and rulings that are preserved for review irrespective of any action or inaction on the part of the parent should not be derailed simply because the parent is unable to produce an adequate record. [¶] . . . [A] social services agency has the obligation to make a meaningful effort to locate and interview extended family members to obtain whatever information they may have as to the child's possible Indian status. [Citation.] The agency cannot omit from its reports any discussion of its efforts to locate and interview family members who might have pertinent information and then claim that the sufficiency of its efforts cannot be challenged on appeal because the record is silent." (*In re K.R.* (2018) 20 Cal.App.5th 701, 708-709.) We conclude the department cannot use the faulty record it created as a basis for concluding the error was harmless.

Finally, the department argues there was no harm because father is a presumed father but not a biological father. They ask us to follow our colleagues in the Fourth District, Division 1, who held as a matter of first impression that the Native American heritage of a presumed parent does not trigger ICWA notice obligations unless they are also the biological or adoptive parent of the child. (*In re C.A.* (2018) 24 Cal.App.5th

511.) We do not believe it's appropriate for us to reach this new issue, because the trial court never resolved whether father is a biological parent. It's true D.H.'s attorney appeared to concede D.H. was not the biological father at one point, but the alleged biological father turned out not to be biologically related to K.H. and the trial court found only that D.H. was K.H.'s presumed father based on his marriage to mother. D.H. later asserted he was K.H.'s biological father. The trial court never ruled on that issue. In any event, since we must remand for the department to investigate mother's family, we exercise our discretion and defer both the factual and the legal issue to the trial court.

Accordingly, we conditionally reverse the order terminating D.H.'s parental rights. On remand, the department will have the opportunity to gather missing information about K.H.'s heritage on both mother's and father's sides of the family, and if necessary, provide notice to any identified tribes. Whether notice and response are required, the department must then present the relevant facts to the trial court, which will then be in a position to determine whether ICWA applies.

III

DISPOSITION

We conditionally reverse the order terminating D.H.'s parental rights. On remand, the trial court shall (1) direct the department to comply with the inquiry and notice provisions of ICWA and sections 224.2 and 224.3 and update the court on its inquiry and the tribes' responses and (2) determine whether ICWA applies. If the court determines ICWA does not apply, the order terminating D.H.'s parental rights shall be reinstated and

further proceedings conducted, as appropriate. If the court determines ICWA applies, the court shall proceed in conformity with ICWA and related California law.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.